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No. 94-1188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

AMERICAN PRESIDENT LINES, LTD., and AMERICAN PRESIDENT COMPANIES, LTD.,

Petitioners,

v.

GAMMA-10 PLASTICS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners, American President Lines, Ltd. ("APL"), and American President Companies, Ltd., respectfully submit this Reply to the Brief in Opposition of Respondent Gamma-10 Plastics, Inc.

TARIFF PROVISIONS AS A SOURCE OF NOTICE

Respondent argues vigorously that the central issue in this case is "notice." *See, e.g.*, Brief in Opposition ("Br. Opp.") at 9. We agree. Respondent was on constructive notice of APL's one-year time-for-suit limitation because, among other reasons, the time-for-suit provision was in-

cluded in APL's filed tariff. Accordingly, respondent is bound by the limitation and its suit should be dismissed.

There is an acknowledged conflict among the circuits on whether a filed tariff provides constructive notice of a one-year time-for-suit limitation. The First Circuit holds that it does while the Eleventh Circuit holds that it does not. *See* Petition for Certiorari ("Petn.") at 9-11. The court below followed the Eleventh Circuit and rejected the views of the First Circuit. In addition, the Fifth Circuit has held that a filed tariff provides constructive notice in analogous cases involving the terms and conditions of a bill of lading. *See* Petn. at 10.

Respondent argues that the tariff is irrelevant here because APL did not issue bills of lading for the second, third, and fourth shipments as quickly as it did for the first shipment, but the argument misconceives the nature of a bill of lading. Contrary to respondent's assertions, *see, e.g.*, Br. Opp. at 11, a bill of lading is not the contract of carriage; a bill of lading evidences the contract already in force. *See, e.g.*, Petn. at 3 n.1 (quoting clause paramount) (bill of lading reference to "the transportation agreement evidenced hereby"). Indeed, respondent's first substantive sentence recognizes that "[t]his case arises out of a 1988 contract." Br. Opp. at 2. The parties entered into this contract during the summer of 1988, prior to the first shipment. No one has yet disputed the contract's existence. The only issue is whether it will be on APL's standard terms, included in the filed tariff, or on some other basis.

Respondent's argument also ignores the reason for APL's failure to issue bills of lading sooner. On the second and third shipments, APL declined to issue "freight prepaid" bills (which respondent needed to obtain payment under its letter of credit) until respondent actually prepaid

the freight. On the fourth shipment, APL was unable to issue a bill of lading because respondent never named a specific port of discharge. Yet respondent now argues that it is APL who should be penalized for this failure to make timely payment and provide timely information. *Cf.* Petn. at 11-12. This is an excellent illustration of the weakness with the Eighth Circuit's analysis and the value of relying on the filed tariff to provide constructive notice.

THE FAIR OPPORTUNITY DOCTRINE

Respondent admits that there is a conflict among the circuits on the fair opportunity doctrine, *see* Br. Opp. at 8, but argues that this case is a poor vehicle for resolving the conflict because (i) it does not involve the package limitation under section 4(5) of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. § 1304(5), and (ii) there is no conflict on the proposition that the carrier has the initial burden of proof under the doctrine.

Respondent is correct in observing that every prior fair opportunity case involved the COGSA package limitation. Indeed, in the court below we maintained that the doctrine should not be extended beyond the section 4(5) context. But respondent cited section 4(5) cases to the Eighth Circuit and successfully argued that the doctrine should be expanded to govern the time-for-suit limitation here. *See, e.g.*, Reply Brief of Appellant/Cross-Appellee, *Gamma 10 Plastics, Inc. v. American President Lines*, 32 F.3d 1244 (8th Cir. 1994) (No. 93-3285) (citing *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806 (9th Cir. 1982); *General Electric Co. v. M/V Nedlloyd*, 817 F.2d 1022 (2d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988); *Sony Magnetic Products v. Merivienti*, 668 F. Supp. 1505 (S.D. Ala. 1987)). It is somewhat ironic that respondent now believes

these same cases have nothing to do with the time-for-suit limitation. It is also incorrect. The Eighth Circuit adopted the fair opportunity analysis, and is now a part of the intercircuit and international conflict.

Respondent's second argument on this issue is both wrong and irrelevant. It is wrong because not every court has held that the carrier has the initial burden of proving fair opportunity, even in the package limitation context. *See Henley Drilling Co. v. William H. McGee & Co.*, 36 F.3d 143, 146 n.5 (1st Cir. 1994); *Anticosti Shipping Co. v. St-Amand*, 1959 S.C.R. 372, 374-377, 19 D.L.R.2d 472, 473-475, 1959 AMC 1526, 1527-29 (Can.). More importantly, the principal dispute here is about whether APL satisfied the burden. The court below held that APL failed because it found actions inadequate that other courts have held sufficient. Even if APL properly bears the burden here, APL satisfied that burden by, among other things, including the time-for-suit provision in its filed tariff. There is a clear and acknowledged conflict among the circuits on this issue, and the court below is undeniably a part of it. *See, e.g.*, Petn. at 15.

RESPONDENT'S OTHER ARGUMENTS

Respondent asserts that this case presents a unique factual situation that is not likely to recur, Br. Opp. at 11, but offers no explanation as to why this case is unusual. In truth, the facts relevant to the question presented to this Court are entirely ordinary. This point has already been effectively demonstrated in the Brief *Amicus Curiae* of Assuranceforeningen Skuld, et al. *See* Brief *Amicus Curiae* at 3-7. *Amici*, who represent a majority of the world's ocean-going commerce, are certainly in a position to know what is normal in the industry.

Respondent hints that this case may be unworthy of the Court's attention because it is interlocutory. Br. Opp. at 12. While it is true that the case has been remanded to the district court for a new trial, APL's entitlement to the time-for-suit provisions would not be an issue at that trial. This case is ripe for review on this question now. Nothing could be gained in a new trial that would be of any relevance to this issue, and the district court would be forced to spend several weeks in a trial that may turn out to be meaningless. Sound practices of judicial economy militate in favor of review of the Eighth Circuit's decision now, while the expense of a retrial can still be avoided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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